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# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 33

THE DEPOSIT BANK OF FRANKFORT.....*Plaintiff in Error*

*vs.*

THE BOARD OF COUNCILMEN OF THE CITY OF FRANKFORT.....*Defendant in Error.*

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

## BRIEF FOR DEFENDANT IN ERROR.

T. H. CROCKETT, City Attorney.
IRA & W. H. JULIAN,
For Def't in Error.

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1902.

No. 296.

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*vs.*

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

## BRIEF FOR DEFENDANT IN ERROR.

### STATEMENT.

This action is a suit in equity, instituted in the Franklin Circuit Court in August, 1894, by the city of Frankfort against the Deposit Bank of Frankfort.

The suit is for satisfaction of said city's demand against said bank for city *ad valorem* taxes under levies of 1892, 1893 and 1894, and also for certain penalties and interest.

By a final order entered in said Franklin Circuit Court on September 27th, 1894, from which no appeal was ever prayed, the taxes for 1892, and also said penalties and interest (that is, interest on 1893 and 1894 taxes up to the institution of this suit) were disposed of, leaving now in controversy herein only the taxes for 1893 and 1894, with legal interest thereon from August 22nd, 1894, until paid. (Record, pages 4 to 7.)

Said bank answered, relying upon its claim of exemption under the Hewitt Law. The case was submitted on the pleadings; and, on February 1st, 1896, the said Franklin Circuit Court sustained said claim of exemption, holding the Hewitt Law to be an irrevocable contract between said bank and the State, and dismissed the city's petition.

To said judgment of the Franklin Circuit Court, the city of Frankfort (Board of Councilmen of the City of Frankfort) ex-

cepted, and an appeal from said judgment was duly prayed and prosecuted by said Board of Councilmen to the Court of Appeals of Kentucky. (Record, pages 11 and 12.)

The case having been tried on said appeal in the Court of Appeals, said judgment of the Franklin Circuit Court was, on June 19th, 1900, reversed by said Court of Appeals upon the ground that the Hewitt Law never constituted an irrevocable contract between the Deposit Bank of Frankfort and the State, and had been repealed by the Revenue Act of 1892, and that said Deposit Bank was not exempt from taxation on its franchise under the Revenue Act of 1892. (Record, page 14.)

Thereupon a petition for rehearing was filed by said bank in the Court of Appeals, which was, on December 18th, 1900, overruled by the Court of Appeals. The order overruling said petition for rehearing was supported by an opinion delivered by Judge Hobson. (Record, pages 20 and 21.)

The case having been returned to the Franklin Circuit Court for new trial in accordance with said judgment and opinion of the Court of Appeals, said judgment of the Franklin Circuit Court which had been rendered on February 1st, 1896, was set aside and a new trial ordered under and in accordance with said judgment and opinion of the Court of Appeals.

Thereupon said bank filed a supplemental (or amended) answer, relying upon a judgment of the United States Circuit Court for the District of Kentucky, rendered on June 25th, 1898, in the case of Deposit Bank of Frankfort against Stone, Auditor, et al., as an estoppel against the city of Frankfort herein. A reply to said supplemental answer and rejoinder to said reply were also filed, making the sole remaining issue between the parties hereto—that is, whether or not the city of Frankfort was estopped from collecting the taxes herein by the said Federal Court judgment (decree) of June 25th, 1898?

The case having been tried in the Franklin Circuit Court on the pleadings as thus amended, on February 2, 1901, said Circuit Court rendered a judgment dismissing the petition upon the ground that there had not been a valid return of "no property found"—ignoring or not passing upon the said question of estoppel. (Record, pages 33 and 34.)

The Board of Councilmen of the City of Frankfort excepted to said second (2nd) judgment of the Franklin Circuit Court, and duly prosecuted an appeal therefrom to the Court of Appeals.

The case having been tried, on said second appeal, the Court of Appeals, on November 19th, 1901, reversed said second judg-

ment of the Franklin Circuit Court, holding that the city of Frankfort was not estopped from collecting the taxes herein by the said Federal Court judgment of June 25th, 1898. (Record, pages 169, 170, 171 and 172.)

From this last judgment of the Kentucky Court of Appeals, this Writ of Error is prosecuted.

No writ of error was ever prosecuted or prayed from the first said judgment of the Kentucky Court of Appeals, delivered by Judge Hazelrigg on June 19th, 1900. (Record, page 14.)

Hence, the question of whether or not the Hewitt Law constitutes an irrevocable contract between the Deposit Bank of Frankfort and the State, and also every other question which was involved in the case on trial of the said first appeal to the Court of Appeals, are now *res judicata* herein between the parties to this Writ of Error.

Every question and matter, therefore, has now been eliminated from this case, by the said final judgment of the Kentucky Court of Appeals (of June 19th, 1900), except the said question of estoppel by reason of the said Federal Court judgment of June 25th, 1898.

## BRIEF OF ARGUMENT.

The sole ground relied on for reversal is the proposition, that the United States Circuit Court for the District of Kentucky (in Deposit Bank of Frankfort against Stone, Auditor, et al., decided on June 25th, 1898) held that the Hewitt Law constituted an irrevocable contract between the Deposit Bank of Frankfort and the State of Kentucky.

If that proposition were true, the said bank's plea of estoppel would not be available herein, because of the first judgment by the Kentucky Court of Appeals herein rendered on June 19th, 1900, from which no writ of error was ever prosecuted or prayed. (Record, page 14.)

An estoppel against an estoppel sets the matter at large. (Bigelow on Estoppel, 5th Ed., page 360, and authorities there cited.)

Said proposition, however, is unsound. Said Federal Court, in said case of Bank vs. Stone, Auditor, et al., did not hold that the Hewitt Law constituted an irrevocable contract between the Deposit Bank of Frankfort and the State of Kentucky.

All that said Federal Court, in said case (through Judge Taft), held was:

That *the Franklin Circuit Court* had, on February 1st, 1896, so held (that is, that the Hewitt Law was an irrevocable contract); and that the State and its municipalities and taxing districts were estopped by said judgment of the Franklin Circuit Court from collecting from said bank any other taxes than such as were provided for by said Hewitt Law, so long as said Franklin Circuit Court judgment remained unreversed and in full force and effect.

Judge Taft did not thereby approve said Franklin Circuit Court judgment as valid. On the contrary, Judge Taft, on said same day, June 25th, 1898, in his opinion which embraced all the Kentucky tax cases, decided on that day, held that the Hewitt Law did not constitute an irrevocable contract between the State of Kentucky and any bank which had accepted the same. (See Record, pages 148 and 149.)

There is no inconsistency whatever between said Federal Court decree of June 25th, 1898, and said State Court (Court of Appeals) judgment of June 19th, 1900.

The said question of Hewitt Law contract decided by the Kentucky Court of Appeals on June 19th, 1900, is an entirely different question from the said question of estoppel decided by Judge Taft on June 25th, 1898.

The former is a Federal question. The latter is not a Federal question. (Phœnix Insurance Co. vs. Tennessee, 161 U. S., 184.)

The said question of estoppel by reason of said Franklin Circuit Court judgment, decided by Judge Taft adversely to the city of Frankfort, is not involved in this case. Said Franklin Circuit Court judgment is not pleaded nor relied on as an estoppel herein.

The foregoing is the view of this case entertained by the Kentucky Court of Appeals on trial of the second appeal to that court herein. (See opinion of Court of Appeals, by Chief Justice Paynter, on second appeal to that court herein. (Record, page 170.)

When this case reached the Court of Appeals on the second appeal herein, no question whatever remained or was involved in the case which was involved in the case of Deposit Bank vs. Stone, Auditor, et al., decided by Judge Taft in 1898.

Hence, the judgment and opinion of the Court of Appeals, rendered on November 19th, 1901, from which this writ of error is prosecuted, was unquestionably correct. The objections thereto now being urged by the plaintiff in error are as unfounded as was its original claim of irrevocable contract.

All that this court has ever required of the courts of last resort of the States, in giving effect to Federal Court judgments, is: That Federal Court judgments be given the same effect that is given State Court judgments, of the same character and rendered under similar circumstances, by the courts of the State in which they are rendered.

We understand that section 905, Revised Statutes U. S., as construed by this court in numerous cases, so requires

In the case of Mills vs. Duryee, 7 Cranch, 484, this court having under consideration the question above suggested, after discussing the constitutional provision and act of Congress on the subject, Justice Story delivering the opinion, said:

> "It remains only then to inquire in every case what is the effect of a judgment in the state where it is rendered, * * * and we can perceive no rational interpretation of the act of Congress, unless it declares a judgment conclusive when a court of the particular state where it is rendered would pronounce the same decision."

In the case of Hampton vs. McConnel, 3 Wheaton, 234, this court, Chief Justice Marshall delivering opinion of the court, said:

> "This is precisely the same case as that of Mills vs. Duryee. The court cannot distinguish the two cases. The doctrine there held was, that the judgment of a state court should have the same credit, validity and effect, in every other court in the United States, which it had in the state where it was pronounced, and that whatever pleas would be good to a suit thereon in such state, and none others, could be pleaded in any other court in the United States."

To the same effect is McElmoyle vs. Cohen, 13 Peters, 326; Christmas vs. Russell, 5 Wallace, 290; Thompson vs. Whitman, 18 Wallace, 457; Phoenix Ins. Co. vs. Tennessee, 161 U. S., 184; Abraham vs. Casey, 179 U. S., 218.

We have, therefore, only to ascertain the effect as an estoppel given to such judgments, as that relied on by appellee herein, "by the courts, laws and usage" of Kentucky. Would the same be a good plea of estoppel in the courts of Kentucky if the same were a judgment of that state?

In the case of City of Newport, &c., vs. Commonwealth, 21 Ky. L. Rep., 47 (decided April 26, 1899), the Kentucky Court of Appeals said:

"The only question remaining for decision is upon the plea of *res judicata*. The plea in this case avers that the subject-matter of the former suit was identical with that involved in this action and that the facts were the same in both actions, except that the former action attempted to collect a tax for the year 1893, and the present action was attempting to collect a tax for the year 1894. * * * * *

"The authorities seem to hold that when a court of competent jurisdiction has, upon a proper issue, decided that a contract, out of which several distinct promises to pay money arose, has been adjudged invalid in a suit upon one of those promises, the judgment is an estoppel to a suit upon another promise founded on the same contract. But taxes do not arise out of contract. They are imposed in invitum. The tax-payer does not agree to pay but is forced to pay, and *the right to litigate the legality of a tax* UPON ALL GROUNDS *must of necessity exist regardless of former adjudications as to the validity of a different tax.* * * * * *

"The decision of the Circuit Court as to the taxes for 1893 is not binding upon this court as to the taxes for subsequent years.

"It follows, therefore, that the judgment must be affirmed.

"The whole court sitting."

It matters not, therefore, *upon what ground* the exemption is claimed in the former suit—whether that of contract, or that the property is used for governmental purposes, or that it is exempted by statute, or that the exemption claimed is a vested or constitutional right—whatever the ground of exemption relied on and litigated in the former suit as to one year's taxes, the adjudication (according to the foregoing decision), is not conclusive as to the same matters of fact or law in a subsequent litigation between the same parties as to any other year's taxes.

The above doctrine, announced by the Kentucky Court of Appeals in 1899, in the foregoing case, has been uniformly adhered to by that court ever since, and has been reasserted by the same court in numerous cases between the date of said decision and the present time.

The next Kentucky case involving the same question was that of the Louisville Bridge Co. vs. The City of Louisville, 22 Ky. L. Rep., 703 (decided Oct. 17, 1900)—in which the Court of Appeals said:

"In response to appellant's plea of *res judicata*, it may be said that this identical question was before the court in the case of the Henderson Bridge Co. vs. The City of Henderson, decided June 24, 1896, and in the very recent cases of Newport vs. Masonic Temple Co., 20 Ky. L. Rep., 266, and The City of Newport vs. Commonwealth, 21 Ky. Law Rep., 42. It was held that a judgment as to the validity of taxes for one year is not conclusive as to the validity of taxes on the same property for another year, and as the question is fully considered in these cases it is unnecessary to elaborate it again."

On the same subject, in the case of Negley, Sheriff, vs. City of Henderson, 59 S. W., 19 (decided Nov. 21, 1900), a Kentucky case, the Court of Appeals said:

"This brings us to consider the question of *res judicata*. It was, in City of Newport vs. Commonwealth, *supra*, distinctly and emphatically held that an adjudication as to the tax of one year did not create the estoppel of *res judicata* against the same tax for another year."

The next case to same effect, in Kentucky, was that of Bell County Coke and Improvement Co. vs. The City of Pineville, 23 Ky. L. Rep., 933 (decided October 4, 1901). The substance of the decision is stated in the syllabus as follows:

"A judgment enjoining the collection of a tax for one year does not prevent the collection of a tax for another year."

The opinion, after stating the case and coming to the plea of *res judicata*, said:

"The case of the City of Newport, &c., vs. Commonwealth, 21 Ky. L. Rep., 42, is decisive of the question raised by the plea of *res judicata*."

The case of the Board of Councilmen of the City of Frankfort vs. Deposit Bank of Frankfort, 23 Ky. Law Rep., 1285 (decided on Nov. 19th, 1901), involved the same question. Exemption was claimed by the bank on the ground of a former adjudication of contract in a litigation as to taxes for the years 1895, '6, '7

and '8. The court, holding the plea of estoppel to be unavailable, said:

> "It is not necessary for this court to hold, and it does not (the question not being before it), that the bank is responsible for the taxes for the years involved in the Federal Court proceeding. However, we do hold that the judgment of the Federal Court is not a bar to a recovery of the taxes for the *years 1893 and 1894*.
>
> "This court, in City of Newport vs. Commonwealth, 21 Ky. Law Rep., 42; Louisville Bridge Co. vs. City of Louisville, 22 Ky. Law Rep., 703, held that an adjudication as to one year's taxes is not a bar to a recovery in the litigation as to any other year's taxes."

The last-named case was followed, on Dec. 19th, 1901, by the case of the Lou. Bridge Co. vs. City of Louisville, 65 S. W. R., 814. The plea of estoppel by *res judicata* was interposed as a ground of exemption. But the Court of Appeals (Ky.) said: "The plea of *res judicata* relied on for reversal has been decided so frequently adversely to the contention here made in recent decisions of this court that it is unnecessary for us to consider this question: It having been expressly decided that a judgment by a court of competent jurisdiction in a suit for taxes for one year did not constitute a bar in a subsequent suit between the same parties under the same law for another year's taxes"—(the court here citing with approval the Kentucky cases on that subject above referred to in this brief.)

In the case of Douglas vs. Commonwealth, 15 Ky. L. Rep., 581, the Court of Appeals held the same character of judgment as that now relied on by appellee to be no estoppel *solely upon the ground that the former judgment was erroneous and had been overruled.*

The court, on that subject, said:

> "It is contended that the subject of appellee's right is *res judicata* in this court. It is sufficient to say that the state had no constitutional right to contract its police power away, consequently the appellee made his purchase of the franchise subject to the right of the State to repeal it; and the decisions of this court that the appellee's purchase of the franchise by the authority of the legislature created a contract that could not, under the Federal Constitution, be revoked, having been

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virtually overruled by the Supreme Court of the United States (the fact that the said decisions by this court have been overruled) destroys the contention of the *res judicata*."

The opinion last cited was affirmed by this court, in Douglas vs. Kentucky, 168 U. S., 488.

There can be no doubt, therefore, what effect as an estoppel the Kentucky Court of Appeals would give the judgment relied on herein by the appellee as an estoppel if the same were a judgment of any court of Kentucky.

*Viewed in the light of the Kentucky decisions alone, the same is not an estoppel in this case.*

Hence, under the now well established principle first announced in Mills vs. Duryee, 7 Cranch, and adhered to by this court ever since, the plea of estoppel by appellee is not available herein.

## II

The judgment from which this writ of error is prosecuted not only gives to the judgment relied on as an estoppel herein the same effect which that court has uniformly given to the same character of judgments rendered by the courts of Kentucky, but also the same effect which this court has uniformly given to such judgments.

There are two classes of estoppel by *res judicata*—namely, 1st, "estoppel by former judgment," and 2nd, "estoppel by former verdict."

Said two classes are defined as follows:

> "We have now ascertained the nature of the pleas of former judgment and of former verdict, and the distinction between them: the former operating as a bar to subsequent *actions* founded on the same demand; the latter operating as a bar to the further litigation of the special *findings* of the jury irrespective of the nature of the cause of action." (Bigelow on Estoppel, 5th Ed., pages 80 to 103, and authorities there cited.)

The claim of estoppel now relied on herein belongs to the 2nd of said two classes—namely, "estoppel by former verdict." (Keokuk & Western Railroad vs. Missouri, 152 U. S., 314 and 315.)

This character of estoppel is subject to very many restrictions.

Unlike estoppels by former judgment (which apply to all matters both of law and fact, which were litigated and determined in the former suit, and also to all matters which might have been litigated and determined in the former suit) the estoppel by former verdict is restricted to issues of *fact* which were *actually litigated and determined* in the former suit and which arise in the second suit under substantially the same circumstances as in the first action. (Cromwell vs. Sac, 94 U. S., 315; New Orleans vs. Citizens Bank, 167 U. S., 371.)

There are numerous other restrictions to which this character of estospel is subject, but the purposes of this case require only mention of those above stated.

There is now no issue of fact or of law involved in this case which was involved or determined in the case of Deposit Bank of Frankfort vs. Stone, Auditor, et al., decided on June 25th, 1898.

The question of the Hewitt Law contract was involved in this case until the same was eliminated from the case by the judgment of the Court of Appeals on the first appeal herein. Besides, that question was not decided adversely to the city of Frankfort in the said decree of June 25th, 1898. On the contrary, Judge Taft, in his opinion rendered in support of his several decrees entered on said date, decided that question adversely to the claim of irrevocable contract, thus sustaining the city of Frankfort's contention as to that question.

The question of estoppel in said litigation of 1898 was only as to the effect that should be given said Franklin Circuit Court judgment while the same remained unreversed and in full force and effect.

There is no such question of estoppel in this case.

Besides, said Franklin Circuit Court judgment has been reversed and set aside under a judgment of the Court of Appeals from which no appeal or writ of error has ever been, or can now ever be, prosecuted.

The sole foundation of the said decree of June 25th, 1898, has ceased to exist by subsequent events, and the rights of the parties to said litigation of 1898 completely reversed. When said decree was entered by Judge Taft, the city of Frankfort was estopped by said Franklin Circuit Court judgment, and the Deposit Bank was thereby exempt from taxation under the Revenue Act of 1892. Since said decree the circumstances and rights of the parties hereto have been changed, and the right adjudged to said bank on June 25th, 1898, has ceased to exist, because the sole ground of exemption from taxation has been removed, leaving

the Deposit Bank of Frankfort, with respect to taxation, precisely as it would have been had said erroneous judgment of the Franklin Circuit Court never been rendered. Galpin vs. Page, 18 Wallace, 374; Freeman on Judgments, 4th Ed., Vol. 1, Sec. 329, and authorities there cited.

The brief of counsel on the other side, and also the dissenting opinion below herein, proceed upon the hypothesis that the decree relied on herein as an estoppel belongs to the class of "estoppels by former judgments," instead of the class of "estoppels by former verdict." Hence, their vagueness, confusion and erroneous conclusions.

The defendant in error most respectfully asks that the judgment below be affirmed.

T. H. CROCKETT, City Attorney.
IRA & W. H. JULIAN,
For Def't in Error.

# APPENDIX.

In the case of C. & V. R. R. Co. vs. Fosdick, 106 U. S., there had been certain decrees based entirely upon a preceding decree, which latter, in the meantime, had been *reversed;* and the Supreme Court held: That the reversal of the decree on which the other decrees were based, *ipso facto,* vitiated the latter, the Supreme Court using the following language:

"The decrees involved in this appeal now under consideration are dependent upon the decree of foreclosure and sale, and the latter having been reversed, the decrees in question *are left without support, and fall of themselves by reason of that reversal, vitiated by the common error.*" To the same effect is Butler vs. Eaton, 141 U. S., 243. So the decree and order of June 25, 1898 (in controversy herein), after reversal of said Franklin Circuit Court judgment, *is left without support, and falls of itself by reason of the reversal of the judgment on which it was based.*

Besides, there is no REASON for the chancellor's giving any other or further effect to a decree or order of injunction *after the foundation thereof has been destroyed, and the purpose thereof has been fully accomplished,* whatever the general language of injunction (which is always used with especial reference to the state of case existing at the time of the decree) may be. (Pennsylvania vs. Wheeling and Belmont Bridge Co., 18 Howard, 421; also City of Newport vs. Newport Light Co., 14 Ky. L. Rep., 485.)